National Audubon Society

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May 6, 1997

The Honorable Gary Locke
Governor, State of Washington
Legislative Building
Olympia, Washington 98504-0002

RE: E2SHB 1866 - Establishing an "Environmental Excellence" Program
VETO REQUEST

Dear Governor Locke:

On behalf of the National Audubon Society's 26 chapters and 18,000 members statewide, I would like to take this opportunity to request that you **veto E2SHB 1866 in its entirety**. The bill purports to encourage facilities in the state to provide better environmental results, when in reality it will only **weaken environmental protections and place neighboring communities at unnecessary risk**. It is for this, and other reasons, that we ask for your veto of E2SHB 1866.

The bill contains a number of flaws including:

1. Better environmental results are not assured. (Section 3)
2. Eliminates SEPA protections. (Sec 15)
3. Changes judicial review to make it more difficult for citizens to challenge the decision to enter into an Agreement. (Sec 10)
4. Does not provide certainty to the agency in the event of termination of the agreement. (Sec 11)
5. Does not allow for meaningful public participation. (Sec 6)
6. Weakens existing water quality laws. (Sec 31)
7. The process for developing this legislation was exclusive and did not include a broad cross-section of interested parties making the program flawed in its inception.

Given the defects in this bill, **what is the solution?** Veto the bill in its entirety and appoint a task force to create a true "Environmental Excellence" program. This task force could be directed to identify the existing flexibility afforded facilities under current law, identify the limitations to innovation that might currently exist, and design a program that will address these limitations and be a consensus solution acceptable to all parties. We have a track record of success on consensus solutions of this type including issues such as regulatory reform, the Model Toxics task force, the Land Use Commission, and the Timber/Fish/Wildlife group. Now we have an opportunity to build on these successes by developing a true "Environmental Excellence" program in a consensus process.

1. Better environmental results are not assured. (Section 3)

The bill claims to require better environmental results (section 1), however a closer reading reveals that the proponent may achieve **either** "more effective environmental results" **OR** "more efficient environment results". "More efficient" results are defined as those that achieve reduced costs for the facility but do not decrease the current environmental impacts of the facility. (Section 3) If the bill is going to create exemptions from current law, exemptions that create increased risk to neighboring communities, then the proponents must be required to improve upon current environmental performance, not merely do the same at a cost savings to them. To do otherwise would place all the risk on communities and none of the burden on the facility.

The goal of any successful "Environmental Excellence" program must be to provide for improved environmental performance at facilities in exchange for flexibility and certainty for the facility operators. This bill only provides the certainty to the proponent. We cannot risk the health of our communities and our environment with this proposal.

2. Eliminates SEPA protections. (Sec 15)

The State Environmental Policy Act (SEPA) is a tool by which information about a proposed action or decision can be disseminated so that agencies and members of the public can evaluate the proposal to determine if there will be significant impacts on the environment. SEPA also requires the evaluation of alternatives to a proposed course of action so that the alternative with the least impact on the environment can be selected. Finally, SEPA also allows for the creation of a record of the information that the decision maker will rely upon in making the decision.

This bill makes the decision to enter into an Agreement exempt from SEPA. The result is a lack of information to the public about the proposal, no alternatives will be considered, and there will be no record of what the agency based its decision on when agreeing to the proposal. Although the bill does state that an assessment of environmental impacts will be considered, and that information will be made available to the public, there is no assurance as to what the information will be, in what context the information will be, and there is no assistance in the interpretation of this information.

3. Changes judicial review to make it more difficult for citizens to challenge the decision to enter into an Agreement. (Sec 10)

Currently, the issuance of a permit by Ecology may be appealed by the public through the Pollution Control Hearings Boards. This bill is fundamentally an alteration of current permitting practices. The Agreement itself becomes the permit. (For example, see section 13(1) which states that any violation of the Agreement is subject to the same enforcement as the permits. See also section 9(1) which indicates that the legal requirements of a permit may be superseded by the Agreement.) Since the Agreement is now the permit, then the judicial review procedure should be the same as is required for current law for a permit. That is, review through the Pollution Control Hearings Board. Unfortunately, the bill requires appeal to the superior court, a time consuming process and a drastic change in current law.

Furthermore, the bill would raise the bar for those citizens appealing the decision. Current law requires agencies to have "substantial evidence" to support the decision. In an appeal, the evidence may be reviewed to determine whether there was in fact substantial evidence to support the decision. This bill would change that standard to one of "arbitrary and capricious". Evidence is not placed on the record, the review is only whether the agency acted arbitrarily in making its decision. This is a much higher standard. Also, the decision of the agency is afforded "substantial deference" by the court - that is, it is assumed to be a correct decision.

All of these changes serve to restrict the ability of citizens to question the decision to enter into an Agreement and limits their right to appeal. These provisions are unacceptable.

4. Does not provide certainty to the agency in the event of termination of the agreement. (Sec 11)

Section 11 provides for termination of an Agreement in the event of a number of factors including endangerment to the public. The section provides that the director may establish interim requirements for the operation of the facility following such termination. (See Section 11(4) line 22.) However, these interim measure are provided judicial review, and do not take effect until the judicial review has been resolved! This means that **the Agreement, which has been found by the director to be endangering human health and safety, is still in effect while the interim measures are appealed - a process that could take as long as 2 years!**

5. Does not allow for meaningful public participation. (Sec 6)

Meaningful public participation is more than requesting participation and allowing review of the proposal. The data behind these Agreements is very technical and difficult for the lay person to interpret. Meaningful participation would include technical assistance grants to help in the analysis of the data, would incorporate the ideas and concerns of the stakeholders in the final Agreement, and would encourage the long-term cooperation and coordination between the stakeholder group and the facility. This bill does not establish that relationship.

6. Weakens existing water quality laws. (Sec 31)

RCW 90.54.020(3)(b) prohibits the discharge of pollutants into a water body if such a discharge will result in a reduction in existing water quality. Section 31 of this bill would allow an Agreement to supersede this fundamental protection of the waters of our state. This is especially inappropriate given the current listing of several river segments in the state for violation of 303(d) Clean Water Act standards. This provision would undermine existing cooperative efforts to clean up our rivers and improve their water quality in the face of potential listings of salmon.

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7. The process for developing this legislation was exclusive and did not include a broad cross-section of interested parties making the program flawed at its inception.

The proponents of this program made no serious effort to incorporate the concerns of affected organizations. In fact, when the bill was in the Senate, negotiations took place between Ecology and the Association of Washington Business at the AWB offices, to the exclusion of all other parties. This is not the way to create a long lasting and effective program.

Conclusion

E2SHB 1866 is a flawed bill that poses significant risks to the environment and to communities neighboring facilities that would take advantage of this program. Listed above are a number of fatal defects in the bill that warrant a full veto.

There is an opportunity for a creative solution to this issue. By vetoing this bill and appointing a task force to create an "Environmental Excellence" program, a level playing field for participation of all stakeholders in such a program would be assured and possible challenges to such a program would be reduced. But even more important, a program would be developed that would provide the flexibility and certainty that the regulated community desires, while involving neighboring communities and interested parties in the program. Truly a win-win solution.

Thank you for the opportunity to provide our comments on this legislation.

Sincerely,

NATIONAL AUDUBON SOCIETY

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